INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI 1
Statute and Resolution in Question 2
Petitioner's Injury 3
Jurisdiction 4
Decision of District Court 6
Decision of Circuit Court of Appeals 7

CERTIFICATE OF COUNSEL FOR WRIT 9

BRIEF FOR PETITIONER 11
Preliminary Statement 11
Jurisdiction 14
Grounds on Which Writ is Sought 16

POINTS:

I. The decision of the Circuit Court of Appeals in this case is in conflict with the applicable decisions of this Court 17

(A) Under the authority of Nixon v. Herndon and other cases, Chapter 67 of the Laws of 1927 of Texas and the resolution of the Democratic State Executive Committee adopted under delegation of authority from the Texas Legislature are unconstitutional and void under the Fourteenth and Fifteenth Amendments to the Constitution of the United States 17

(i) Analysis of the Texas statutes and the attempt to nullify Nixon v. Herndon 19

PAGE

(ii) State Executive Committee as an agency of the Legislature. 21

(iii) The "inherent power" argument. 23

(iv) Texas cases defining legislative and party powers. 24

(B) The respondents in refusing to permit the petitioner to vote were acting in their official capacities as state officers, because they were applying state powers to a public purpose. Under doctrine of Home Tel. & Tel. Co. v. Los Angeles, their conduct violated the constitutional rights of the petitioner irrespective of the validity of Chapter 67 of the Laws of 1927. 28

(i) Powers vested in judges of election. 29

(ii) Acts of respondents attributable to state. 31

II. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in Bliley v. West. 34

III. The action of the respondents was in violation of Section 31 of Title 8 of the United States Code. 36

IV. This Court should assume jurisdiction of this case by writ of certiorari because of the importance of the question raised. 37

CASES CITED.

PAGE

Anderson v. Ashe, 62 Tex. Civ. App. 262, 130 S. W. 1044 23
Ashby v. White, 2 Ld. Raym. 938, 3 id. 320 18
Ashford v. Goodwin, 103 Tex. 491, 131 S. W. 535 23

Binderup v. Pathe Exchange, 263 U. S. 291 16
Bliley v. West, 42 Fed. (2nd) 101 ..... 7, 16, 34
Briscoe v. Boyle (Tex.), 286 S. W. 275 ..... 23, 24, 26, 27

Child Labor Tax Case, 259 U. S. 20 21
Commonwealth v. Willcox, 111 Va. 849 34

Ford v. Surgett, 97 U. S. 594 22

General Investment Co. v. N. Y. Central R. R. Co., 271 U. S. 228 16
Giles v. Harris, 189 U. S. 475 18
Guinn v. United States, 238 U. S. 347 ..... 21, 39

Hammer v. Dagenhart, 247 U. S. 251 21
Hendricks v. State of Texas, 20 Tex. Civ. App. 178 ... 33
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278 .. 8, 22, 28, 31

Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120 33
King Mfg. Co. v. Augusta, 277 U. S. 100 ..... 22, 31

Lincoln v. Hapgood, 11 Mass. 350 33
Lindgren v. United States, 281 U. S. 38 24
Love v. Griffith, 266 U. S. 32 ..... 27, 28, 39
Love v. Wilcox (Tex.), 28 S. W. (2nd) 515 .. 23, 24, 27, 30

Myers v. Anderson, 238 U. S. 368 ..... 16, 21
Newberry v. United States, 256 U. S. 232 37

PAGE

Nixon v. Condon:
34 Fed. (2nd) 464 (District Court) 6, 13
.. Fed. (2nd) ... (Circuit Court) 35
Nixon v. Herndon, 273 U. S. 536 .. 2, 7, 8, 13, 16, 17, 18, 19, 22, 23, 26, 27, 35, 38

Standard Scale Co. v. Farrell, 249 U. S. 571 ..... 22, 31
State ex rel. Moore v. Meharg (Tex. Civ. App.), 287 S. W. 670 37
Swafford v. Templeton, 185 U. S. 487 ..... 16, 37

Tumey v. Ohio, 273 U. S. 510 33

Waples v. Marrast, 108 Tex. 5, 184 S. W. 181 22
West v. Bliley, 42 Fed. (2nd) 101, aff'g 33 Fed. (2nd) 177 ..... 7, 8, 16, 36, 39
White v. Lubbock (Tex. Civ. App.), 30 S. W. (2nd) 722 22
Wiley v. Sinkler, 179 U. S. 58 ..... 16, 18, 37
Williams v. Bruffy, 96 U. S. 176 22
Willis v. Owen, 43 Tex. 41 33

Yick Wo v. Hopkins, 118 U. S. 356 38

TEXTS AND NOTES.

American Law Reports, Vol. 53, p. 595 33
"Commerce Clause and Police Power," Thomas Reed Powell, 12 Minn. Law Rev. 321, 470 24
"Disenfranchisement of the Negro at the Primaries," Meyer M. Brown, 23 Mich. Law Rev. 279 ..... 23, 38
"Primary Elections," Merriam & Overacker (1928 Edition) 23

REFERENCES TO CONSTITUTION.

PAGE

Constitution of the United States:
Fourteenth Amendment.....6, 7, 13, 17, 18
Fifteenth Amendment.....6, 7, 13, 17, 18

UNITED STATES STATUTORY REFERENCES.

Judicial Code:
Section 24 (1).....5, 14
Section 24 (11).....5, 14, 18
Section 24 (12).....5, 14, 18
Section 24 (14).....5, 14, 18
Section 240.....2, 16

Revised Statutes:
Section 2004..... 6

United States Code:
Title 8, Section 31.....5, 15, 36
Title 8, Section 43.....5, 15
Title 28, Section 41 (1).....5, 13, 14, 18
Title 28, Section 41 (11).....5, 13, 14, 18
Title 28, Section 41 (12).....5, 13, 14, 18
Title 28, Section 41 (14).....5, 13, 14, 18
Title 28, Section 347.....2, 5, 16

Supreme Court Rules:
Rule 28, par. 5 (b)..... 8

TEXAS STATUTORY REFERENCES.

Revised Civil Statutes of 1925:
Elections—Chapter 8..... 29
Elections—Chapter 13.....12, 21
Elections—Chapter 13, Article 3105.....29, 30
Elections—Chapter 13.....12, 20, 21
Elections—Chapter 13, Article 3093-a (former Article 3107).....2, 17
Elections—Chapter 13, Article 3107 (Chap. 67, Laws of 1927).....2, 3, 4, 5, 6, 7, 12, 13, 17, 19, 22, 23, 24, 25, 26, 27, 28, 38
Resolution of Democratic State Executive Committee.....3, 4, 5, 12, 27

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Supreme Court of the United States

OCTOBER TERM, 1931.

No.....

L. A. NIXON,
Petitioner,

against

JAMES CONDON and C. H. KOLLE,
Respondents.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner above named hereby respectfully applies for a writ of certiorari whereby the United States Circuit Court of Appeals for the Fifth Circuit will be required to certify to this Honorable Court for its review the transcript of record in the case entitled "L. A. Nixon, Appellant, *versus* James Condon and C. H. Kolle, Appellees, No. 5758," in which the said Circuit Court of Appeals on May 16, 1931, affirmed a judgment rendered on July 31, 1929, by the United States District Court for the Western District of Texas, El Paso Division, which dismissed the petition, filed therein by the petitioner in an action to recover damages from the respondents for their wrongful refusal to permit him to vote at a Democratic primary election at which they were the duly appointed judges. In

support hereof (under §347, Title 28, U. S. Code; Judicial Code, §240) your petitioner respectfully alleges:

FIRST: On March 7, 1927, this Honorable Court, in *Nixon* v. *Herndon et al.*, 273 U. S. 536, held your petitioner entitled to recover damages against election officials who had refused to permit him to vote at a Democratic primary election in Texas because he was a Negro and who claimed that he was expressly prohibited from participating therein by Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, originally enacted in 1923 as Article 3093-a thereof. This Honorable Court held (a) that "the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result"; (b) that Article 3107 (3093-a), under which the judges had purported to act, was clearly invalid as a violation of the Fourteenth Amendment to the Constitution of the United States and therefore afforded them no defense; and (c) that your petitioner could maintain the action against them in a District Court of the United States despite the fact that the parties therein were all citizens of the State of Texas.

Statute and Resolution in Question.

SECOND: Immediately after the decision of this Honorable Court, and as your petitioner verily believes, in order to circumvent and destroy its effect in establishing the constitutional right of Negro citizens of Texas not to be excluded from primary elections therein solely because of their color, the Legislature of the State of Texas, by Chapter 67 of the Laws of 1927, approved June 7, 1927, enacted as follows:

> "Section 1. That Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas be and the same is hereby repealed and a new article is hereby enacted so as to hereafter read as follows:

'Article 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.'

Sec. 2. *The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity* that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted." (Italics petitioner's.)

THIRD: Thereafter, purporting to act pursuant to the authority conferred by Chapter 67 of the Laws of 1927 as aforesaid, the State Executive Committee of the Democratic Party in Texas adopted the following resolution:

"'Resolved: That all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and Secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance.'"

Petitioner's Injury.

FOURTH: On July 28, 1928, a Democratic primary election was held in the State of Texas for the purpose of selecting the candidates of the Democratic Party for all

precinct, county, district and state officers, and for representatives in the Congress of the United States and for United States Senator.

FIFTH: Your petitioner then was and now is a Negro as defined by the statutes of the State of Texas. He was born in the State of Texas of parents who were citizens of the United States. On July 28, 1928, he was a resident of Precinct No. 9 in the City and County of El Paso, Texas, a bona fide member of the Democratic Party of the State of Texas, and possessed all the qualifications required under the laws of Texas of voters and electors in order to vote in Precinct No. 9 at the said primary election. He also was not subject to any disqualification or disability to vote thereat unless the fact that he was a Negro was itself a disqualification or disability depriving him of the right to vote at the said election.

SIXTH: On the said July 28, 1928, your petitioner duly presented himself at the polling place in Precinct No. 9, and at an hour prescribed by law for the holding of the said primary election, and requested the respondents Condon and Kolle to supply him with a ballot and permit him to vote. The said respondents, who were the duly appointed judges of election at the said election in the said Precinct No. 9, refused to furnish your petitioner with a ballot or to permit him to vote, assigning as the reason therefor that pursuant to the resolution of the State Democratic Executive Committee of Texas, adopted under the authority of Chapter 67 of the Laws of 1927, the County Democratic Executive Committee of El Paso County, Texas, had instructed them to deny all Negroes the right to vote at the said election. The said resolution is the same one set forth in paragraph Third of this petition.

Jurisdiction.

SEVENTH: Your petitioner thereafter commenced an action against the said respondents to recover $5,000 dam-

ages from them for their wrongful refusal to permit him to vote at the said election. This action was commenced in the United States District Court for the Western District of Texas, El Paso Division. The jurisdiction of the Court was based upon the United States Judicial Code, Sections 24 (1), (11), (12) and (14); 28 United States Code, Sections 41 (1), (11), (12) and (14) (see, also, 8 U. S. C., Secs. 31 and 43).

EIGHTH: Your petitioner filed a petition, in the said action in the said District Court, setting out the facts on which he relied to establish the jurisdiction of the Court and his right of action against the respondents. In the said petition he alleged with greater detail all the facts hereinabove set forth. He also alleged, among other facts, that Chapter 67 of the Laws of 1927 was enacted by the Legislature of the State of Texas, and that the resolution of the State Democratic Executive Committee was adopted pursuant thereto, *in order to defeat and destroy* the effect of the decision of this Honorable Court, rendered in *Nixon* v. *Herndon* as aforesaid, and in order to deprive all Negro citizens in Texas, including your petitioner, of the right to vote at Democratic primary elections in the State of Texas, guaranteed and secured them by the Constitution and laws of the United States. He further alleged that the Democratic Party is the only party actually required under the laws of Texas to select its candidates by primary election; that its candidates are invariably elected by large majorities at the final election, and that the primary election at which those candidates are chosen is, to all practical intents and purposes, the real election which actually determines the persons who will inevitably be elected to office at the final election. Your petitioner further alleged that Chapter 67 of the Laws of 1927, and the resolution of the State Democratic Executive Committee, adopted pursuant thereto, were violative of the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and contrary to the laws enacted by the Congress of the United States, especially including Section 31 of Title 8 of the

United States Code (R. S., Sec. 2004). Your petitioner further alleged that the action of the respondents Condon and Kolle as judges of the said election, in refusing him the right to vote at the said election, was wrongful, unlawful and violative of his constitutional rights, and that it deprived him of a valuable political right to his damage in the sum of $5,000.

NINTH: The respondents thereafter filed a motion in the said District Court to dismiss the petition in the said action against them. The motion, on various grounds, challenged the sufficiency of the facts set forth in the petition, both to establish the jurisdiction of the Court and the petitioner's right of action against the respondents.

Decision of District Court.

TENTH: Hon. Charles A. Boynton, the judge who heard the motion in the District Court, thereafter filed a written opinion stating the reasons why the motion to dismiss should be granted. This opinion is set out on pages 23-38 of the transcript of record, and has also been reported in 34 F. (2nd) 464. In his opinion Judge Boynton held: (1) that the Fourteenth and Fifteenth Amendments to the Constitution of the United States cannot be violated except by some action properly to be characterized as state action; (2) that Chapter 67 of the Laws of 1927 on its face directs no action in violation of the Federal Constitution; (3) that the action of the State Democratic Committee and the judges of election, complained of in the petition, was not state action, because (a) the members of the committee and the judges of election were not paid by the state, and so were not like the persons officiating at the Illinois and Virginia primaries, who have been held liable in damage to qualified citizens to whom they denied the right to vote, (b) they were not officers of the state, (c) they were acting only as private representatives of the Democratic political party, and (d) the members of the

Democratic Party possess inherent power to prescribe the qualifications of those who may vote at its primaries, irrespective of and without reference to Chapter 67 of the Laws of 1927; and (4) that a primary election is not an election within the meaning of the Fifteenth Amendment, because (a) a political party is not a governmental agency, and (b) at the time the Thirteenth, Fourteenth and Fifteenth Amendments were adopted, primary elections were unknown and therefore may not be held to be covered by these amendments.

Decision of Circuit Court of Appeals.

ELEVENTH: After the entry of a judgment in the said District Court dismissing his petition, your petitioner duly appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The Circuit Court affirmed the judgment below, holding, in a written opinion, (1) that the Fourteenth and Fifteenth Amendments apply to state action, not to action of private individuals or associations; (2) that this case differs from *Nixon* v. *Herndon,* because there the element of state action was supplied by the enactment of a statute which expressly discriminated against Negroes, whereas here the statute merely recognized an existing power on the part of the Democratic State Executive Committee to fix the qualifications of its members; (3) that the election officials who rejected the petitioner were appointed by the Democratic State Executive Committee, and were not paid by the state, and (4) that the decision in *West* v. *Bliley* is distinguishable because there the State of Virginia conducted the primary and paid the expenses thereof, whereas in Texas the state merely regulates a privately conducted primary election so as to secure a fair and honest election.

TWELFTH: Your petitioner respectfully submits that the judgment dismissing his petition in the District Court, and the affirmance thereof by the Circuit Court of Appeals, were wholly erroneous for the reasons, among others, spe-

cifically stated in the assignment of errors contained in the record (R. 16-20) and discussed in the brief hereto annexed, and that this Honorable Court should grant the writ of certiorari prayed for herein in order to review and reverse the action of the courts below.

Among other grounds which here exist for granting this writ, your petitioner respectfully invites attention to the following specified in Rule 28, paragraph 5 (b) of the Rules of this Honorable Court: (1) The Circuit Court of Appeals has decided either (a) "a federal question in a way probably in conflict with" *Nixon* v. *Herndon* and *Home Tel. & Tel. Co.* v. *Los Angeles,* applicable decisions of this Honorable Court. (2) The Circuit Court of Appeals "has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter" in *West* v. *Bliley,* 42 F. (2nd) 101. (3) The Circuit Court of Appeals "has decided an important question of general law in a way probably untenable or in conflict with the weight of authority." The existence of each of these grounds for granting the writ prayed for will become apparent during the course of the argument in the supporting brief, annexed hereto and made a part hereof.

WHEREFORE, your petitioner prays this Honorable Court to issue a writ of certiorari directing Circuit Court of Appeals for the Fifth Circuit to certify the record in this case to this Court for review and determination.

Dated, July 29, 1931.

L. A. NIXON,
Petitioner,
By JAMES MARSHALL,
Petitioner's Counsel,
Office & Post Office Address,
165 Broadway,
New York City.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
COUNTY AND STATE OF NEW YORK,

JAMES MARSHALL, being duly affirmed, says that he is one of the counsel for L. A. Nixon, the petitioner herein, that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

JAMES MARSHALL.

Subscribed and affirmed before me
this 29th day of July, 1931.

NATHANIEL H. KUGELMASS,
Notary Public,
Kings County.
Kings Co. Clks. No. 560, Reg. No. 2261.
N. Y. Co. Clks. No. 565, Reg. No. 3K370.
Commission expires March 30, 1933.

(Seal)

CERTIFICATE OF COUNSEL.

I hereby certify that in my opinion the foregoing Petition for Writ of Certiorari is well founded in law.

JAMES MARSHALL,
Counsel.

Supreme Court of the United States

OCTOBER TERM, 1931.

L. A. NIXON,
Petitioner,

vs.

JAMES CONDON and C. H. KOLLE,
Respondents.

BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

Preliminary Statement.

The petitioner, a citizen of the United States and of the State of Texas, brought this action in the United States District Court for the Western District of Texas against the respondents, who were judges of election in Precinct No. 9, El Paso County, Texas, to redress an injury which he sustained by reason of the acts of the respondents in their official capacities (R. 2).

The petitioner is a Negro. He was a bona fide member of the Democratic Party of the State of Texas and in every respect was entitled to participate in elections held within that state, whether for the nomination of candidates for office or otherwise (R. 3).

On July 28, 1928, a Democratic Primary was held in the State of Texas to select candidates not only for state officers, but also for United States Senator and Congressmen (R. 2). On that day the petitioner presented himself at the polls and offered to take the pledge to support the

nominees of the Democratic Primary Election held on that day and to comply in every respect with the valid requirements of the laws of Texas, save as they violated the privileges conferred upon and guaranteed to him by the Constitution and Laws of the United States. He requested the respondents to supply him with a ballot and permit him to vote at the Democratic Primary Election held on that day and the respondents refused to permit the petitioner to vote or to furnish him with a ballot and stated as the reason that under instructions from the Democratic County Chairman, pursuant to a resolution of the State Democratic Executive Committee adopted under the authority of Chapter 67 of the Laws of 1927 of Texas, only *white* Democrats were allowed to participate in the Democratic Primary then being held. *The respondents ruled that the petitioner was not entitled to vote in the Democratic Primary because he was a Negro* (R. 3, 4, 7). The resolution of the State Democratic Executive Committee of Texas, under the color of which respondents purported to act, reads as follows:

> "Resolved: That all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

The statute under the authority of which the Democratic State Executive Committee adopted this resolution, Chapter 67 of the Laws of 1927 (Article 3107, Chapter 13 of the Revised Civil Statutes of Texas), gave authority to the State Executive Committee to prescribe qualifications of party members and determine who shall be qualified to vote or participate in such political party. This statute was passed as an "emergency" measure because, as the

statute itself proclaims, "the fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each House be suspended * * *."

The decision of this Court which was referred to by the Texas Legislature was the case of *Nixon* v. *Herndon*, 273 U. S. 536, which held unconstitutional a statute of the State of Texas which expressly prohibited Negroes from participating in Democratic Primary Elections held in that state. It is alleged in the complaint, and the history of the Act sustains the allegation, that Chapter 67 of the Laws of 1927 was an attempt to evade the decision of this Court in *Nixon* v. *Herndon* and to provide, by delegation to the party Executive Committee, the disenfranchisement of Negroes which this Court held could not be done by direct action of the Legislature (R. 6, 7, 8).

This suit was brought under Section 41 of Title 28 of the United States Code, subdivisions 1, 11, 12 and 14 being applicable.

Judgment is demanded against the respondents (a) because Chapter 67 of the Laws of 1927 of Texas and the resolution of the Democratic State Executive Committee thereunder denied the plaintiff of the equal protection of the laws of Texas in violation of the Fourteenth Amendment to the United States Constitution; (b) because the plaintiff's right to vote at the Primary Election was denied and abridged by the resolution of the Democratic State Executive Committee and the action of the Legislature of Texas on account of his race and color in violation of the Fifteenth Amendment to the Constitution; (c) because the resolution and statute in question are contrary to Section 31 of Title 8 of the United States Code; and (d) because the respondents acting under a delegation of state power violated those sections of the Constitution and that Act of Congress when they denied the petitioner the right to vote on the ground that he is a Negro (R. 8-12).

The plaintiff's petition was dismissed by the District Court (34 Fed. [2nd] 464) and the opinion of Judge Boyn-

ton is printed on pages 23 *et seq.* of the record. The Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the District Court with an opinion (Fed. [2nd]) printed on pages 40 *et seq.* of the record.

Jurisdiction.

Jurisdiction of Federal Courts over this suit is provided by Section 41 of Title 28 of the United States Code (Judicial Code, Sec. 24 as amended). It is there provided that the District Court shall have original jurisdiction over:

> "(1) * * * *First.* Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority * * *."

Subdivision 11 provides for suits for injuries on account of acts done under laws of the United States "or to enforce the right of citizens of the United States to vote in the several States." Subdivision 12 deals with suits concerning civil rights and gives to the District Courts jurisdiction

> "Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 47 of Title 8."

In subdivision 14 it is provided that the Court shall have jurisdiction

> "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity secured by the

> Constitution of the United States or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

This suit is not only a suit to redress deprivation of civil rights by reason of the unconstitutional restraint upon the petitioner's right of suffrage in violation of the Fourteenth and Fifteenth Amendments, but it is also based specifically upon the violation of a Federal statute, to-wit, Section 31, Title 8 of the United States Code, which provides:

> "Section 31. *Race, color, or previous condition not to affect right to vote.* All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

Section 43 of Title 8 of the United States Code also grants a right of action for violation of the right of franchise granted by Section 31.

It should in this connection be noted that not only candidates for local office, but also for United States Senator and Congressmen were nominated at the primary held on July 28, 1928 (R. 2).

The Circuit Court of Appeals accepted jurisdiction of this cause and decided the motion to dismiss upon the merits (R. 41).

The District Court, after deciding the motion on the merits, evidently confused the question of jurisdiction and the question of absence of merits in the discussion in the last paragraph of the opinion. This distinction between jurisdiction and merits has been clearly set forth by this

Court in *Binderup* v. *Pathe Exchange*, 263 U. S. 291, at page 305, and *General Investment Co.* v. *N. Y. Central R. R.*, 271 U. S. 228, at page 230.

In cases similar to this one this Court has assumed jurisdiction.

Wiley v. *Sinkler*, 179 U. S. 58-65;
Swafford v. *Templeton*, 185 U. S. 487;
Myers v. *Anderson*, 238 U. S. 368;
Nixon v. *Herndon*, 273 U. S. 536.

Grounds on Which Writ of Certiorari Is Sought.

The petitioner now prays for a writ of certiorari* for the following reasons, which will be discussed *in extenso* in the subsequent pages.

(A) The decision of the Circuit Court of Appeals for the Fifth Circuit in this case is in conflict with applicable decisions of this Court.

(B) The decision of the Circuit Court of Appeals in this case is in conflict with the recent applicable decision of the Circuit Court of Appeals for the Fourth Circuit in *West* v. *Bliley*, 42 Fed. (2nd) 101.

(C) Because of the importance of the questions raised by this suit, which, if not reversed, will legalize a practice which disenfranchises the Negroes of Texas.

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* See Title 28, §347, U. S. Code; Judicial Code, §240.

POINTS.

I.

The decision of the Circuit Court of Appeals in this case is in conflict with the applicable decisions of this Court.

A.—UNDER THE AUTHORITY OF NIXON V. HERNDON AND OTHER CASES, CHAPTER 67 OF THE LAWS OF 1927 OF TEXAS AND THE RESOLUTION OF THE DEMOCRATIC STATE EXECUTIVE COMMITTEE ADOPTED UNDER DELEGATION OF AUTHORITY FROM THE TEXAS LEGISLATURE ARE UNCONSTITUTIONAL AND VOID UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Nixon v. *Herndon*, 273 U. S. 536, is in all respects except one identical with the present case. There Nixon, this same petitioner, brought his action against the judges of election for refusing to permit him to vote at a primary election in Texas. Damages were sought, as here, for $5,000. The primary election then, as in this case, was held in El Paso for the nomination of candidates for Senator and representatives to Congress and state and other officers on the Democratic ticket. Then, as in this case, the defendant judges of election refused to permit the petitioner to vote in the Democratic Party primary because he was a Negro. In that case their action was based upon the Texas statute enacted in May, 1923, designated Article 3093-a (the former Art. 3107, Texas Rev. Civ. Stats.), which provided that "in no event shall a negro be eligible to participate in a Democratic Party primary election held in the State of Texas," etc. Now the judges of election have refused to permit the petitioner to vote at the primary because of the resolution of the State Democratic Executive, quoted *supra*, which was adopted pursuant to Chapter 67 of the Laws of 1927 and which restricts voting in Democratic primary elections to *"white Democrats."* In both cases it has been contended that the deprivation of the

petitioner of the right to vote was in violation of the Fourteenth and Fifteenth Amendments. Then, as now, the defendants moved to dismiss on the ground that the subject matter was political and not within the jurisdiction of the Court and that no violation of the amendments was shown.

The holdings of this Court in *Nixon* v. *Herndon* which are controlling here are that (1) the plaintiff was injured by a deprivation of civil rights, and (2) this deprivation was without constitutional justification. The Court decided:

(A) Although the petition concerned political action, it alleged and sought recovery for private damage and the suit could be maintained under the authority of *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320; *Wiley* v. *Sinkler, supra*; *Giles* v. *Harris*, 189 U. S. 475, 485; Judicial Code, Sections 24 (11), (12), (14).*

(B) There is no distinction between the petitioner's right to vote at a primary election and at a final election.**

(C) The Court did not pass upon the Fifteenth Amendment "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." And the Court then pointed out that the Fourteenth Amendment was passed with a special intention to protect Negroes from discrimination (and the same, of course, is true of the Fifteenth Amendment).

(D) Finally, it was held that the Texas statute of May, 1923, was unconstitutional because in assuming to forbid Negroes to take part in primary elections, "the importance of which we have indicated," it was discriminating against them by the distinction of color alone and "color cannot

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* Section 41, Title 28, U. S. Code.

** In that case Mr. Justice Holmes said, page 540: "If the defendant's conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote in a final election allow it for denying a vote at the primary election that may determine the final result."

be made the basis of a statutory classification affecting the right set up in this case."

The injury in this case is identical with that in *Nixon* v. *Herndon*.

The sole question before this Court is whether constitutional justification exists in this case. Absence of constitutional justification will be demonstrated if it is established that the action of the respondents as judges of elections was taken under state authority or was in effect action by the state itself. The present case will then come within the category of Nixon v. Herndon.

Analysis of the Texas Statutes and the Attempt to Nullify *Nixon* v. *Herndon*.

Let us first examine Chapter 67 of the Laws of 1927. It reads as follows (R. 5, 6):

"AUTHORIZING POLITICAL PARTIES THROUGH STATE EXECUTIVE COMMITTEES TO PRESCRIBE QUALIFICATIONS OF THEIR MEMBERS.

(H. B. No. 57)

Chapter 67.

An Act to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and substituting in its place a new article providing that every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas be and the same is hereby repealed and a new article is hereby enacted so as to hereafter read as follows:

'Article 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.'

Sec. 2. The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved June 7, 1927.
Effective 90 days after adjournment."

The statute declares an emergency to exist. What was the emergency in June, 1927? It was, as expressed in Section 2, the fact that on March 7, 1927, this Court had declared the existing statute restricting Negro voting in Democratic primaries to be unconstitutional. That created an emergency in that Negroes might legally vote in Democratic primaries unless something were done.

The respondents claimed, and the District Court and Circuit Court of Appeals held in this case, that the political parties had inherent power to determine who should vote at party primaries. The Texas Legislature, however, has not taken this same view. Having already assumed control over primary elections,* it proceeded by Chapter

* Primary elections are themselves compulsory under the Texas statutes for all parties which cast more than 100,000 votes at the last general election (1925 Tex. Rev. Civ. Stats., Elections, Art. 3101). Actually, this provision has been applied, and now does apply only to the Democratic Party because it alone has been able to muster the requisite number of votes. The time, place and manner of holding Primary Elections, as well as of determining and contesting the results thereof, are comprehensively and minutely described by statutory provisions (*Idem.*, Arts. 3102-3105, 3108, 3109-3114, 3116-3117, 3120, 3122-3127, 3146-3153).

67 of the Laws of 1927 to delegate to the state executive committee of every political party in the state the power to prescribe qualifications for membership and who should be qualified to vote or otherwise participate in the political parties.

That it was the legislative intention to evade and nullify the decision of this Court appears upon the face of the enactment; and from the wording of the statute itself it is equally apparent that the Legislature was not surrendering the control of the franchise in primary elections, but was providing for the control in another way. The statute was, to quote its own terms, "to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and *substituting in its place* a new Article * * *." If the Democratic Legislature of Texas could not constitutionally forbid Negroes to vote in primaries, it could nevertheless with a feeling of assurance entrust to the Democratic State Committee the power to enact such prohibition and achieve the same end. This Court has held that a legislative body cannot accomplish by indirection something which it is without power to do directly (*cf. Hammer* v. *Dagenhart*, 247 U. S. 251, and *Child Labor Tax Case*, 259 U. S. 20).

Thus this Court has held that a state could not re-establish the *status quo* of the days before the adoption of the Fifteenth Amendment through the medium of "grandfather clauses" which sought to exclude Negro voters from the polls.

Guinn v. *The United States*, 238 U. S. 347;
Myers v. *Anderson*, 238 U. S. 368.

State Executive Committee as an Agency of the Legislature.

The Legislature having made the Democratic State Executive Committee its agency, the old maxim *qui facit per alium facit per se* is applicable. It follows that the resolution of the executive committee must be read as an inte-

gral part of the statute itself, and when superimposed upon Chapter 67 of the Laws of 1927, this new section is identical with the old Article 3107, which was considered and condemned in *Nixon* v. *Herndon.*

It is not necessary to hold that the Democratic State Executive Committee was for all purposes the agent of the state, but in so far as the powers of the Legislature to control and supervise primary elections and determine the eligibility of the participants was delegated to it, the executive committee was *pro tanto* the agency of the state. From this point of view it is, therefore, immaterial whether the Legislature and the courts of Texas may or may not deem the expenses of the party or the costs of the primaries to be proper charges upon the state treasury (*cf. Waples* v. *Marrast,* 108 Tex. 5, 184 S. W. 181, and *White* v. *Lubbock,* Tex. Civ. App. 1930, 30 S. W. [2nd] 722).

It is elementary that a state cannot perform by an agency an act which it cannot accomplish in its own name, that it cannot give the force of law to a prohibited enactment, from whatever source originating.

Williams v. *Bruffy,* 96 U. S. 176;
Ford v. *Surgett,* 97 U. S. 594;
King Manufacturing Co. v. *Augusta,* 277 U. S. 100, 107-114;
Home Tel. & Tel. Co. v. *Los Angeles,* 227 U. S. 278.

In *Standard Scale Co.* v. *Farrell,* 249 U. S. 571, at page 577, Mr. Justice Brandeis said:

> "* * * For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission."

The "Inherent Power" Argument.

The contention has been advanced by the respondents, and approved by the courts below (R. 36, 42), that political parties have *inherent power* to prescribe the qualifications of their members and of those who may vote at primary elections held for the purpose of selecting their candidates for the general election. This being so, it is urged, the Democratic State Executive Committee had inherent power to adopt a rule disqualifying Negroes from voting at Democratic primary elections and to instruct the judges at such elections to exclude all Negroes from participation.

This argument has no basis in the political rationale of this age. The state's right to control primaries and to adopt *reasonable* classifications has not been questioned even by *Nixon* v. *Herndon*. It is recognized by the Texas courts in

Love v. *Wilcox*, Tex. , 28 S. W. (2nd) 515;
Briscoe v. *Boyle* (Tex.), 286 S. W. 275;
Ashford v. *Goodwin*, 103 Tex. 491, 131 S. W. 535;
Anderson v. *Ashe*, 62 Tex. C. V. App. 262, 130 S. W. 1044.

There is ample authority for the proposition that political parties in their relations to elections and primaries are state agencies. In *"Primary Elections,"* by Merriam & Overacker (1928 Edition), the authors state at page 140:

> "The theory of the party as a voluntary association has been completely overthrown by the contrary doctrine that the party is in reality a governmental agency subject to legal regulations and control."

And see the able article by Meyer M. Brown in 23 *Michigan Law Review* 279.

It is clear that before the enactment of Chapter 67 of the Laws of 1927 (present Art. 3107 of the Rev. Civ. Stats.,

Texas), the state executive committee had neither inherent nor statutory power to disqualify Negroes from voting at primary elections. This conclusion is inevitable from the meticulous manner in which the Legislature has set forth the machinery by which primaries are to be governed (see p. , *infra*) and the very face of Chapter 67 of the Laws of 1927 which purports to give the power of definition of party membership to the state executive committee within specified limitations. If the power were already inherent in the parties, this grant would be idle.

This does not mean that for some purposes the executive committee may not have inherent power still unaffected by the action of the Legislature. Nor does it mean that if the Legislature had not acted with respect to primaries the parties would not have had jurisdiction over the composition of the electorate at such primaries. These are matters that need not now be questioned or decided. It is sufficient that the Legislature has spoken and it therefore must be deemed to have assumed full control of the situation (*Briscoe* v. *Boyle,* Tex., 1926, 286 S. W. 275; *Love* v. *Wilcox,* Tex., 1930, 28 S. W. [2nd] 515). If this were not the case, it was unnecessary for the Legislature to have adopted Chapter 67 of the Laws of 1927. The emergency there stated to exist would have been a mere figment of the legislative imagination and the act itself a voice in vacuum. Only as a last resort can a Federal Court deem such to be the fact. Fruitful analogy may be found in the relation of Congress and the state legislatures in connection with the commerce clause and state police powers.*

Texas Cases Defining Legislative and Party Powers.

The argument of "inherent power" has been disposed of by the Texas courts. *Love* v. *Wilcox,* Tex., 1930, 28 S. W. (2nd) 515, arose under the same statute under considera-

* See article by Thomas Reed Powell, 12 Minn. Law Rev. 321, 470; *Lindgren* v. *U. S.,* 281 U. S. 38, 46.

tion in this case. There the plaintiff sought a mandamus to compel the Democratic State and County Executive Committees to place his name on a gubernatorial ballot of the Democratic primary and to desist from enforcing the resolution passed in February, 1930, by the Democratic State Executive Committee, which precluded anyone from becoming a candidate at the Democratic primaries if he had voted against the party in the 1928 elections after having participated in the Democratic primary of that year. The Supreme Court of Texas held that the provisions of Article 3107 of the Revised Civil Statutes of Texas (Chap. 67 of the Laws of 1927) prohibit the party executive committee from excluding a candidate because of past disloyalty to the party. In that case the party claimed that it had inherent power to manage its own affairs and determine who could present his name for nomination at a primary. The Court considered the broad question of party power in connection with applicable legislation. The Court said in this connection:

> "This case comes clearly within the class of cases involving the enforcement of the sovereignty of the state and the protection of the citizen's right to effective participation in his state's government. All political power is inherent in the people of Texas, whose government is founded on their authority and maintained for their benefit. * * * Section 2 of Article I (i. e., the State Constitution) further pledges the faith of the people of Texas to the preservation of a republican form of government, and declares that 'subject to this limitation only, they (the people) have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.' The primary laws of this State are based upon a recognition of political parties as agencies of the people for the exercise of the powers thus reserved to them by the constitution. It necessarily follows as a part of the right of the people to organize political parties for the constitutional purposes stated that the people of the state have the power, through their Legislature, to enact laws having for

> their purpose the protection of the constitutional rights, declared in the provision just quoted. * * * " (p. 521).

Briscoe v. *Boyle,* 286 S. W. 275 (Tex. Civ. App., 1926), involved the old Article 3107 prior to declaration by this Court in *Nixon* v. *Herndon* that that article was unconstitutional. The question of the inherent power of the political parties to determine their membership was there squarely raised and decided. A county Democratic executive committee adopted a resolution excluding from primary elections all those who had voted against any Democratic gubernatorial nominee at the last election. Fourteen such persons brought suit against the judges of election to enjoin them from enforcing the resolution. The injunction was denied in the lower court, but on appeal the decree was reversed and the injunction granted. The Texas Court of Civil Appeals considered at length the legislative situation with respect to primary elections and held that since the State of Texas had legislated in detail concerning the qualifications of voters in such elections, political parties themselves no longer have any power to prescribe qualifications not made under authority of statute. The Court said:

> "By excluding negroes from participating in party primary elections, and by legislating upon the subject of the character and degree of party fealty required of voters participating in such elections, the Legislature has assumed control of that subject to the exclusion of party action, thus depriving the party of any power to alter, restrict or enlarge the test of the right of the voter to participate in party primaries" (p. 276).

The Court also said:

> "But the Legislature has taken possession and control of the machinery of the political parties of the state, and, while it permits the parties to operate that machinery they do so only in somewhat strict accordance with the rules and regulations laid down in minute and cumbersome detail by the legislative body" (p. 276).

Briscoe v. *Boyle* is especially interesting from the historical point of view because it indicates that whatever power political parties may once have had to determine their membership, the state had absorbed this power and exercised it by the Act of 1923 and had itself determined the eligibility of participants in the Democratic primary elections. Chapter 67 of 1927 in no way surrendered this power. While it authorized the state executive committee to prescribe the qualifications of party members, this was a limited authority in that it prohibited the party from denying anyone the right to participate in a primary because of former political views or affiliations (the question involved in *Love* v. *Wilcox*) and also forbade the parties to discriminate against qualified voters because of their membership or non-membership in organizations other than a political party. In other words, the fact of membership or non-membership in the Klu Klux Klan or a benevolent order or a church could not affect the right to vote. It is clear that the Legislature had no intention, even if it had the right, to abandon its jurisdiction over the primaries of the state.

It follows that the defects of the Act of 1923 are equally inherent in the Act of 1927 as elaborated by the resolution of the Democratic State Executive Committee and that the Act of 1927 as so amplified deprived the petitioner of the equal protection of the laws guaranteed to him by the Fourteenth Amendment and of the right to vote guaranteed to him by the Fifteenth Amendment. The decision of this Court in *Nixon* v. *Herndon* is, therefore, applicable and the Circuit Court of Appeals erred in failing to apply that decision to this case.

Mention must also be made of *Love* v. *Griffith*, 266 U. S. 32. There the plaintiffs as qualified electors sought to enjoin as violative of the Constitution the enforcement of a rule made by the Democratic City Executive Committee of Houston, Texas, that Negroes should not be allowed to vote at a particular Democratic primary election. The bill was denied and the plaintiffs appealed to the Court of

Civil Appeals, which held that at the date of its decision, months after the election, the cause of action had ceased to exist and that the appeal would not be entertained on the question of costs alone. On error to this Court, Mr. Justice Holmes said, page 34:

> "If the case stood here as it stood before the court of first instance it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up. But that is not the situation. The rule promulgated by the Democratic Executive Committee was for a single election only that had taken place long before the decision of the Appellate Court. No constitutional rights of the plaintiffs in error were infringed by holding that the cause of action had ceased to exist. The bill was for an injunction that could not be granted at that time. There was no constitutional obligation to extend the remedy beyond what was prayed."

The "grave question of constitutional law," which this Court could not consider in *Love* v. *Griffith*, because in that instance time had made the issue moot, has become the vital point of conflict in the present suit.

B.—THE RESPONDENTS IN REFUSING TO PERMIT THE PETITIONER TO VOTE WERE ACTING IN THEIR OFFICIAL CAPACITIES AS STATE OFFICERS, BECAUSE THEY WERE APPLYING STATE POWERS TO A PUBLIC PURPOSE. UNDER DOCTRINE OF HOME TEL. & TEL. CO. V. LOS ANGELES THEIR CONDUCT VIOLATED THE CONSTITUTIONAL RIGHTS OF THE PETITIONER IRRESPECTIVE OF THE VALIDITY OF CHAPTER 67 OF THE LAWS OF 1927.

If Chapter 67 of the Laws of 1927 has delegated to the party executive committee the power to exclude Negroes from primary elections, the action of the party executive committee is then the action of the state, as we have shown, *supra*, and the statute to that extent is consequently unconstitutional. If, however, the statute is not deemed to

have delegated the power to exclude Negroes, it would not be unconstitutional; and in that event if the suit were here brought against the party executive committee it might have been a defense that the party executive committee had inherent power to exclude Negroes from voting at primaries. But just as the question here presented does not involve the determination that political parties are for all purposes agencies of the state, so it is unimportant whether political parties have for some purposes inherent power to prescribe the terms of party membership.

This action is not against the party executive committee. It is brought against the judges of election, who—whether they be deemed state officials, party officials or the representatives of the contending candidates who contribute to their remuneration—are clothed with the power to act in the capacity of judges of election at primary elections by the state itself. **Though their designation may come from the party, their powers flow from the state alone and their function as judges of election is to accomplish a state purpose.**

Powers Vested in Judges of Election.

It has already been shown that the Legislature has with meticulous care provided for the time, place and manner of holding primary elections and of determining and contesting the results (*supra*, p. 20). Among the statutory provisions are a number dealing with judges of elections. Their title, position, status, method of appointment, powers and duties are all created and prescribed by law (1925 Tex. Rev. Civ. Stats., Elections, Arts. 3102 *et seq.*). They are thus required to take an oath faithfully to perform their "duty as officer of the election" (Arts. 2998, 3104). They are employed to keep the peace at the primary election, to enforce the anti-loitering law, to make arrests, to administer oaths and conduct examinations thereunder in order to determine the qualifications of voters (Art. 3105).

Article 3105 of the Election Law reads:

> "Judges of primary elections have the authority, and it shall be their duty, to administer oaths, to preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do. Such judges and officers shall compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling place, and shall arrest, or cause to be arrested, anyone engaged in the work of conveying voters to the polls in carriages or other mode of conveyance, except as permitted by this title."

The power "to administer oaths * * * as judges of general elections are authorized and required to do" embraces above all a power to administer such oaths for the purposes of ascertaining the qualifications of a challenged voter. They are thus imbued with the power to determine who is duly qualified as an elector as well as to keep the peace and "to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do."

And thus it appears that even if these respondents be not state officers in the same category and to the same extent as the Governor or the Attorney General of the state, they are, nevertheless, quasi-public officials receiving the definition of their duties and the badge of their authority from the statutes of the state; and the Legislature has by its own edict given to judges of primary elections the powers and duties of judges of general elections (Art. 3105, *supra*).

It requires no further extended argument to demonstrate that the conduct of primary elections is, when authorized by statute, a state function pointed to achieving a fair expression of popular, sovereign will (*Love* v. *Wilcox, supra*), and that the judges of election acting in their capacities as judges of primary elections are fulfilling a state purpose (see discussion *supra*, pp. 25-27).

Acts of Respondents Attributable to State.

If, therefore, these judges of election have abused their state powers and have used them "as the instrument for doing wrongs," their actions are attributable to the state itself. This is clear from a reading of

Home Tel. & Tel. Co. v. *Los Angeles*, 227 U. S. 278;
Standard Scale Co. v. *Farrell, supra;*
King Manufacturing Co. v. *Augusta, supra.*

Home Tel. & Tel. Co. v. *Los Angeles* involved the validity of an ordinance of the City of Los Angeles establishing telephone rates which it was claimed were confiscatory and in violation of the due process clause of the Fourteenth Amendment. The question there was whether in the absence of the final decision by a State Court holding the rates in question to be proper, there could be said to have been such state action by reason of the ordinance alone as would bring the Fourteenth Amendment into play and give the Federal Courts jurisdiction. Mr. Chief Justice White, writing for this Court, said at page 286:

> "* * * the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the States, but also to *every person whether natural or juridical who is the repository of state power.* By this construction the reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted." (Italics ours.)

The emphasis in the *Home Tel. & Tel.* case is placed, not upon the official title of the actor, but upon the vesting in him of state power, viz., power granted by the state devoted to a state purpose. This is made clear from further quotations from the opinion of Mr. Chief Justice

White at pages 287 *et seq.*, where he says, speaking of the Fourteenth Amendment:

> "It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

It was then pointed out that the amendment, in looking to the enforcement of rights which it guaranteed and to the prevention of wrongs which it prohibited, did not proceed only upon the assumption that states acting in their governmental capacities "in a complete sense" may violate the provisions of the amendment, but "which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs" and that the amendment provided against this contingency. And again, at page 288, he said:

> "Under these circumstances it may not be doubted that where a state officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there is a want of power. * * * To repeat, for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done *prima*

facie would violate the Amendment, *the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority.*" (Italics ours.)

Applying that test to this case, it is clear that the respondents would not have had the opportunity to refuse to permit the petitioner to vote in the Democratic Party primary election if they had not become possessed of the power to act as judges of election through act of the Legislature of the state.

It is suggested in the opinion of the District Court (R. 34), and again in the opinion of the Circuit Court of Appeals (R. 42), that in view of the fact that the respondents were paid for the services which they rendered as judges of election out of a fund derived from contributions by the participating candidates, they could not be acting as officers of the State of Texas. The source of remuneration is never determinative as to the status or official capacity of a person. There is no end of cases sustaining this proposition.* See:

Tumey v. *Ohio*, 273 U. S. 510;
Kimbrough v. *Barnett*, 93 Tex. 301, 55 S. W. 120;
Hendricks v. *The State*, 20 Tex. Civ. App. 178, 49 S. W. 705;
Willis v. *Owen*, 43 Tex. 41;
Lincoln v. *Hapgood*, 11 Mass. 350.

If, therefore, these judges of election have abused their powers derived from the state and have used them "as the instrument for doing wrong," their actions are state actions. The classification by reason of color is forbidden to the state by the Fourteenth and Fifteenth Amendments and this prohibition is controlling not only in so far as the legislative action is concerned, but also applies to anyone acting under authority lodged in him by the state.

* Cases are collected in exhaustive note in 53 A. L. R. 595.

We then have the situation of a deprivation of the plaintiff's right not to be discriminated against at the polls by reason of his color; we have a lack of justification; and we have the fact that this unjustified deprivation was made possible only by the patent of authority with which the state has invested these respondents.

II.

The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Bliley* v. *West*.

Bliley v. *West*, 42 Fed. (2nd) 101, arose out of a similar effort by the State of Virginia to disenfranchise Negroes in the primary elections. There the statute described voters as "all persons qualified to vote at the election for which the primary is held, and not disqualified by reason of other requirements in the law of the party to which he belongs." The Democratic State Convention of 1924 in Virginia adopted a resolution declaring that only white persons should participate in the Democratic primary. The action was brought for damages against the judges of election who set up this resolution as a justification. Defendants demurred and the District Court overruled the demurrer with an opinion written by Judge Groner, 33 Fed. (2nd) 177. The case went to trial; upon appeal from the final judgment in favor of the plaintiff, the Circuit Court of Appeals for the Fourth Circuit, 42 Fed. (2nd) 101, affirmed the judgment, adopting the opinion of Judge Groner as its own.

After citing the case of *Commonwealth* v. *Willcox*, 111 Va. 849, at p. 859, in which the Court held that a primary once adopted by a political party becomes and constitutes a necessary part of the election machinery and "fulfils an essential function in the plea to promote honesty in the conduct of elections—elections which shall faithfully re-

flect and register the unbought will of the electors," Judge Groner said as follows, at page 180:

> "The statute of Virginia, unlike that of Texas, does not in terms exclude the negro, but gives to the party participating the right to do so.* The result is the same. The Legislature, pursuant to constitutional authority, having undertaken to regulate primary elections and to authorize them to be held at the public expense and to provide the same rules and regulations applicable to an election, may not indirectly, any more than it may directly, exclude a duly qualified voter who declares himself to be an adherent to the party participating in the primary from the exercise of his right of suffrage. The Fourteenth Amendment compels the adoption of what is called impartial suffrage. Its purpose was to establish all over the United States one people, and that each of these may understand the constitutional fact that his privileges and immunities cannot be abridged by state authority, and that these rights are not confined to any class or race but comprehend all within its scope. The General Assembly of Virginia having provided the primary as a method (though optional) for the nomination of candidates, and the Supreme Court of Virginia having declared it when adopted an inseparable part of the election machinery, it would seem to me necessarily to follow that the legislature cannot by delegation or otherwise give vitality to a claimed right which it is itself prohibited by the Constitution from enacting into law."

Compare this noble language with the narrow construction of the Constitution by the Circuit Court of Appeals in this case. Bryan, C. J., said (R. 42):

> "Each political party is represented by its own election officials who have nothing to do with conducting the primary of any other party. In these particulars the primary election law of Texas differs radically from that of Virginia where the State conducts and pays the expense of holding the pri-

* This refers to the old Section 3107 considered in *Nixon* v. *Herndon*, *supra*.

> mary for all political parties just as it does in the general election. West v. Bliley, 33 F. (2) 177, affirmed by the Circuit Court of Appeals for the Fourth Circuit in 42 F. (2) 101, cannot therefore in our opinion be relied on as authority in this case."

We have already discussed *supra,* page 33, the irrelevance of the argument that there is a categorical difference between cases in which the state pays the primary expenses and one in which the candidates do. This factor was the sole difference between this case and *West* v. *Bliley.* As the situation now stands, Negroes may not be deprived of the vote at primaries conducted in the Fourth Circuit, but they can be excluded in the Fifth Circuit. This discrepancy should be removed by this Court.

III.

The action of the respondents was in violation of Section 31 of Title 8 of the United States Code.

Section 31 of Title 8 of the United States Code has been discussed *supra,* page 15, under the question of jurisdiction. The section provides that all citizens otherwise qualified to vote at any election by the people in any state shall be entitled and allowed to vote at all such elections without distinction on the ground of color, any local law, custom, usage or regulation to the contrary notwithstanding.

The primary election in which the petitioner was denied participation was *inter alia* for the nomination of candidates for representatives to Congress and for United States Senator. There were six candidates for the nomination for Senator and two candidates for the nomination of representative to Congress (R. 2). The petitioner was denied the right to vote because of his color (R. 4). It follows that the action of the respondents violated this Federal statute, to the petitioner's injury. Even if the opinion of the District Court and the Circuit Court of Appeals could be sustained with respect to state officers on the ground

of the inherent power of political parties to make discriminatory regulations with respect to participants in the primary elections, this argument could have no bearing upon the case in the face of this express act of Congress.

Wiley v. *Sinkler, supra;*
Swafford v. *Templeton, supra.*

In this connection it may be pointed out that *Newberry* v. *United States*, 256 U. S. 232, is irrelevant. That case involved the power of Congress to limit the amount of money which a candidate for United States Senator might contribute or procure for his nomination or election. Decided by a divided Court, the case turned upon the interpretation of the authority granted to Congress over the election of its members by Article I, Section 4 of the Constitution. It did not deal with the question of "the right to vote" and the power of Congress to enforce that right as granted by the Fourteenth and Fifteenth Amendments.

IV.

This Court should assume jurisdiction of this case by writ of certiorari because of the importance of the question raised.

The courts of Texas have taken judicial notice of the fact that for all practical purposes, and certainly in so far as state elections are concerned, there is only one political party, and that the real political battles of the state are not those held at the general election, but those waged for nomination at the Democratic primaries. So, in the case of *State ex rel. Moore* v. *Meharg*, 287 S. W. 670, decided by the Court of Civil Appeals of Texas in October, 1926, the Court said:

> "Indeed, it is a matter of common knowledge in this State that a Democratic primary election held in accordance with our statutes is virtually decisive of the question as to who shall be elected at the

> general election. In other words, barring certain exceptions, a primary election is equivalent to a general election.

In an article by Meyer M. Brown, 23 Mich. L. Rev. 279, the author says:

> "In Texas, a victory in a primary, on the Democratic side, means practically certain election."

And history confirms these dicta.

If Negroes in the State of Texas may not vote at Democratic primaries, they are then in a practical manner deprived of their franchise. It is idle to urge that they can participate in other party primaries, for the election of Republican Presidential Electors in 1928 stands out as unique in the political history of the State of Texas. Moreover, under Chapter 67 of the Laws of 1927, the Republican Party can similarly bar Negroes from its primaries and caucuses. The law applies to all parties.

The real question, then, is this: Shall the constitutional right to partake of the basic institution under a republican form of government be denied to a large part of the population by reason of color alone?

This Court cannot accept Chapter 67 of the Laws of 1927 of Texas at its face value, but must go further and examine what has been accomplished behind its bland exterior. In the words of Mr. Justice Matthews in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

If the decision of the Circuit Court of Appeals prevails, then the Fourteenth Amendment as vitalized by *Nixon* v.

Herndon and *West* v. *Bliley*, and the Fifteenth Amendment as interpreted in *Guinn* v. *United States*, 238 U. S. 347, will have been effectively nullified.

The "grave question of constitutional law" referred to by Mr. Justice Holmes in *Love* v. *Griffith*, *supra*, which arose under this very statute, is now for the first time presented to this Court. Your petitioner is confident that this Court again, in the language of Mr. Justice Holmes in that case, will "be astute to avoid hindrances in the way of taking it up."

Respectfully submitted,

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